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EQUITABLE CONVERSION.[1]

IV.

PREVIOUS to the case of Ackroyd *v.* Smithson,[2] it was held that an unqualified direction by a testator in his will to sell land, or to buy land with his money, created a complete conversion in equity of the land into money, or of the money into land, and that this conversion was effective for all the purposes of devolution at the testator's death, so that land thus converted would devolve in equity as if it were money, *i. e.*, would go to the executor, in whose hands it would be money for all purposes, for example, for the payment of debts and legacies, and for distribution among the testator's next of kin; and so that money thus converted would devolve in equity as if it were land, *i. e.*, would pass as land to the testator's devisee, or descend to his heir, — so that it would neither be assets for payment of debts, nor liable for legacies, and the testator's next of kin would have no claim upon it.

Upon what theory was it, then, that this equitable conversion by will of land into money or money into land was held to have the effect of causing land to devolve in equity at the testator's death as if it were money, and money as if it were land? It is plain, and always was plain, that a will can produce no effect till the testator's death.[3] If, then, a testator devise his land to trustees

[1] Continued from 18 HARV. L. REV. 245. [2] 1 Bro. C. C. 503.

[3] In Beauclerk *v.* Mead, 2 Atk. 167, a testator by his will devised his land, in the events which happened, to his sister for life, remainder to A for life, remainder to B for life, and he also directed the residue of his personal estate to be laid out in purchase of land to be settled to the same uses to which his land was devised. By a

in trust to be sold, but fail to make an effective disposition of all the proceeds of the sale, what will happen at his death? Why, the trustees will acquire, under the will, the legal ownership of the land, while each person to whom any portion of the produce of the land is given will acquire an equitable right to have the land sold, and his share of the proceeds paid to him, as well as, incidentally, a right to receive, until the sale is made, the rents and profits of so much of the land as his share of the proceeds of the sale shall represent. On the other hand, so much of the land as shall be represented by the undisposed of proceeds of its sale, will descend in equity to the heir, and, when his title to the land shall be devested by a sale, he will be entitled to receive in exchange a like proportion of the proceeds of the sale. The personal representative will, therefore, have no more to do with the testator's land, or with the proceeds of its sale, than he would have had to do with the land if the testator had died intestate. All this, moreover, is so plain that it seems that the courts must have proceeded upon some other theory in holding the contrary.

Can they have proceeded upon the theory that, as a testator can dispose by his will of the proceeds of a sale of land which he directs by the same will, so such proceeds, if undisposed of, will devolve upon his personal representative? No, clearly not, or at least no such theory can be maintained; for such proceeds have no existence till after the testator's death, nor till after a sale is actually made, and it is only the property and rights of a person which are in actual existence that can devolve at his death on his

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codicil he directed that, on the death of his sister, his land should go, in the events which happened, not to A and B successively for life, but to them jointly for their lives; and, the question being whether the word "land," in the codicil, included the residue of the testator's personal estate, that being land in equity when the codicil was made, Lord Hardwicke answered that it did not, and that it meant the same in the codicil that it did in the will, the residue of the personal estate, not, in truth, becoming land in equity till the testator's death. He said (page 169): "It has been insisted on for the plaintiff that if a man makes a will and disposes of lands, that such devise will pass, not only what the law will pass, but what equity passes likewise, which is money directed to be laid out in land. . . . I allow that the rule laid down by the bar, that money directed to be invested in land, must be considered as land, is very right, but then it is truly said the will must be complete, for it is ambulatory till the testator's death, nor till then can it be considered as land; for would not his personal estate have been subject to all intents and purposes to his debts, supposing there had been any, notwithstanding the devise that the surplus should be invested in land? Suppose the testator had given, by his codicil, all his lands to another person, and his heirs, can anybody doubt whether this would not have made a total variation as to the devisees under the will?"

representatives by operation of law. When a testator by his will makes a gift of such proceeds, the gift is future and executory, and there is in devolutions of property by operation of law nothing analogous to future and executory gifts.

What other theory is there, then, which the courts may have adopted? In framing the question with which the last paragraph but one begins, I have used the words "causing the land to devolve in equity," etc., and I have used these words because, first, the equitable interest in the land is the only thing that can devolve by operation of law in the case supposed; secondly, the equitable interest in the land is the thing that was in fact held to devolve as if it were money; thirdly, there are only two possible alternatives, as the land must either descend as land to the heir, or it must devolve as money upon the personal representative; and, as it was held to do the latter, and as it could so devolve on the supposition that it had been directly converted by equity into money, and on that supposition alone, it seems that that must have been the theory upon which the courts acted. In other words, while an indirect equitable conversion is in truth only a first step towards an alienation of the thing to be converted, and a specific performance of the contract or trust which causes the conversion is indispensable to complete the alienation, the courts acted upon the theory that such a conversion constituted in itself, at the testator's death, a complete alienation in equity of the thing to be converted from the testator's heir to his executor, and from his executor to his heir, and hence that such a conversion of land was a conversion of it, not only as to the executor, but as to the heir as well, and that such a conversion of money was a conversion of it, not only as to the heir, but as to the executor as well. In short, it was held that an indirect conversion, made by will, was an absolute conversion, in so far as it is possible for equity to make an absolute conversion, that land so converted became the absolute property of the testator's executor, in so far as it is possible for an equitable owner to be an absolute owner, and that money so converted became the absolute property of the testator's heir or devisee, in so far as it is possible for an equitable owner to be an absolute owner.[1]

It must not be supposed, however, that courts of equity in thus treating indirect equitable conversions as if they were direct, acted

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[1] See *infra*, p. 14; p. 20, n. 6.

consciously; for in truth they have never recognized the division of equitable conversions into such as are direct and such as are indirect, but have always assumed that all equitable conversions constituted one class only, and have never raised any question as to whether they are made directly or indirectly; and hence they have, not unnaturally, assumed that the effects produced by any equitable conversion will be produced by every equitable conversion, and that whatever is true of any equitable conversion is true of all equitable conversions. Hence, too, the courts, when dealing with an equitable conversion of one kind, have applied to it a mode of reasoning which is applicable to equitable conversions of that kind or which is applicable only to equitable conversions of the other kind, according as the one mode of reasoning or the other best supported the view which they were seeking to establish. More particularly, however, and for reasons stated in a previous article,[1] they have been in the constant habit of applying to indirect conversions reasoning which is applicable only to direct conversions.

What were the authorities by which the foregoing view was supposed to be established? First, there were the two cases of Mallabar *v.* Mallabar[2] and Durour *v.* Motteux,[3] in each of which the decision must have been in favor of the next of kin, but for the fact that there was a residuary bequest which was held to carry everything. There was also the case of Ogle *v.* Cook,[4] which was supposed by everyone to contain an actual decision in favor of the next of kin and against the heir, until Lord Loughborough, fifteen years after Ackroyd *v.* Smithson was decided, declared,[5] as the result of an examination of the Registrar's Book, that, though the point was involved, it was not actually decided by the decree which was made, but was reserved for further consideration. Lastly, there was the case of Fletcher *v.* Chapman,[6] which was the converse of Ackroyd *v.* Smithson, *i. e.*, the testator had directed money to be laid out in the purchase of land, but he had disposed of a life interest only in the land to be purchased, and (according to Tomlin's head note) it was held by Lord Somers, whose decree was affirmed by the House of Lords, that the testator's heir was entitled to the money, subject to the life interest. Lord Cottenham, however, when Master of the Rolls,

[1] See 18 HARV. L. REV. 248, 249.
[2] Cas. *t.* Talbot, 78.
[3] 1 Ves. 320, 1 Sim. & St. 292, n. (d).
[4] 1 Ves. 177.
[5] Collins *v.* Wakeman, 2 Ves. Jun. 683.
[6] 3 Bro. P. C., Tomlin's ed., 1.

concluded, after a careful examination of the case, that the point was not involved, and hence that the decision did not preclude him from deciding the point as he thought right.[1] On the other hand, Digby *v.* Legard,[2] which was the latest case cited in Ackroyd *v.* Smithson, having been decided within six years,[3] was thought to be a very strong authority in favor of the heir and against the next of kin, and to be entitled to great weight. It had not, however, been reported when Ackroyd *v.* Smithson was argued and decided, nor was there then any statement of it in print. There was, indeed, a statement of it by Sir T. Sewell, M. R., in the then unreported case of Fletcher *v.* Ashburner,[4] and from that statement it was cited in Ackroyd *v.* Smithson. According to that statement, however, real estate only was devised, and hence the case was cited, in Ackroyd *v.* Smithson, as one which did not involve the blending of real and personal estate into one fund. When, however, it came to be reported, first by Mr. Cox, in his note to Cruze *v.* Barley[5] and afterwards in Dickens,[6] it appeared that it did involve the element of blending; and therefore, in that respect, it was precisely in point for the heir in Ackroyd *v.* Smithson, though it had been supposed not to be so. For another reason, however, the report in Dickens shows that the decision was not any authority in favor of the heir, or against the next of kin, in Ackroyd *v.* Smithson; for it appears that the reason of the decision in favor of the heir was that the land was merely charged with the payment of the testator's debts and legacies in aid of the personal estate, and that no more of the land was directed or authorized to be sold than should be necessary to satisfy the charge. The case of Emblyn *v.* Freeman[7] was also cited in Ackroyd *v.* Smithson as an authority in favor of the heir. The facts of that case, however, are not such as to render the decision in favor of the heir of much value.[8]

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[1] This opinion was expressed by Sir C. C. Pepys (afterward Lord Cottenham) in his judgment in Cogan *v.* Stephens, decided Nov. 24, 1836. The judgment is given in full in an appendix to the first three editions of Lewin on Trusts. The case is also reported in 5 L. J. N. S. Chan. 17.

[2] 3 P. Wms. 22, n. 1; 2 Dick. 500.

[3] Digby *v.* Legard was decided in June, 1774, and Ackroyd *v.* Smithson in June, 1780.

[4] 1 Bro. C. C. 497, 501.

[5] 3 P. Wms., 4th ed., 22, n. 1, published in 1787. Fletcher *v.* Ashburner was decided just a year before Ackroyd *v.* Smithson. Both cases were first reported by Brown in his second edition, published in 1790.

[6] 2 Dick. 500. Dickens was published in 1803.

[7] Ch. Prec. 541.

[8] See 18 HARV. L. REV. 87.

Such, then, are the authorities in support of the view which, I have said, prevailed prior to Ackroyd *v.* Smithson; and, though they are, upon the whole, stronger than they were supposed to be when Ackroyd *v.* Smithson was decided, they can hardly be said to be decisive. Whether decisive or not, however, the opinion has been universal, since Ackroyd *v.* Smithson was decided, that, prior to that date, the law was as I have stated it to be.

What, then, was the change introduced by Ackroyd *v.* Smithson? The testator, in that case, by his will gave all his land, not therein before given, and all his personal estate to two trustees in trust to sell the same, and, out of the proceeds, to pay the testator's debts and pecuniary legacies, including a legacy to each of fifteen persons, and to divide the residue among the same fifteen persons in proportion to their respective legacies. Two of these legatees died before the testator, and so the gifts to them lapsed; and, the property having been sold, the question was what should be done with so much of the money intended for them as was produced by the sale of the land. It was claimed by the testator's next of kin to belong to them, as having become part of the testator's personal estate, and they filed a bill against the trustees to enforce their claim, making the thirteen surviving legatees and the testator's heir co-defendants. The case was first heard by Sir T. Sewell, M. R., who gave the entire fund, *i. e.*, the produce of the land as well as the personal estate, to the thirteen surviving legatees, whereupon the plaintiffs appealed, and the appeal was heard by Lord Thurlow, who decided in favor of the heir. The latter was represented by Mr. Scott (afterwards Lord Eldon [1]) who argued the cause fully at both hearings. His argument before Lord Thurlow is reported as written out by himself and furnished to the reporter.[2] The heir in fact made no claim to the money, but, being a necessary party to the suit, he had to be represented by counsel at the hearing, and accordingly his solicitor instructed Mr. Scott (who was then only twenty-eight years old, and who had been only four years at the bar [3]) to represent him, and consent, on his behalf, to whatever decree the court should see fit to make, giving

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[1] Lord Eldon gave in a conversation, a little more than three weeks before his death, a very interesting account of his connection with Ackroyd *v.* Smithson. See 1 Twiss, Life of Lord Eldon, 116–120.

[2] See 1 Bro. C. C., Belt's ed., 503, n. 1.

[3] Lord Eldon tells us that during his first eleven months at the bar he received nothing, that during the twelfth month he received half a guinea; see 1 Twiss, 100.

him a fee of one guinea, that being the established fee for such a service. Mr. Scott, however, having satisfied himself that the heir was entitled to the money, so advised him, and declined to represent him unless he could argue the case; and the result was that he argued it at each hearing without a fee, *i. e.*, on receiving a fee merely for consenting to a decree, the heir declining to increase his fee and thus "send good money after bad." [1]

At the hearing before Lord Thurlow, the counsel for the next of kin contended [2] "that the testator had converted his real estate into money, out and out, that he had mixed two funds, and made all personal estate; that the cases therefore of Mallabar *v.* Mallabar and Durour *v.* Motteux must govern the decision here, and that the blending the funds distinguished this case from that of Digby *v.* Legard." Mr. Scott also said: [3] "If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of the lapsed devises would, according to the case of Digby *v.* Legard, and the principle of the case of Emblyn *v.* Freeman, and of many others, have accrued to the heir at law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir at law shall take; because there is an end of the disposition, when there is an end of the purposes for which it was made: — but it is contended here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate, that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases therefore of Durour *v.* Motteux, and Mallabar *v.* Mallabar, are authorities in point, that the whole fund is personal. — We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives." Such were the views of the counsel for the next of kin, so far as we know them, and such were their admissions in favor of the heir and Mr. Scott's admission in favor of the next of kin. It was, therefore, agreed between them that everything depended upon the testator's intention. How, then, was his intention, as to the conversion of his

[1] 1 Twiss, 118. [2] 1 Bro. C. C. 505. [3] 1 Bro. C. C. 506.

land into money, to be ascertained? According to Mr. Scott, the way was, first, to inquire for what purposes he had directed his land to be sold, and, secondly, to what extent those purposes had been effective; for, as to such purposes, if any, as had failed to take effect, Mr. Scott insisted that it was the same as if those purposes had never been declared by the testator. He also argued, with great force, that the entire burden of proof was on the next of kin; that it was not necessary, therefore, for the heir to show that the testator had any intention in his favor, it being sufficient for him that no intention had been shown in favor of the next of kin, while it was indispensable for the next of kin to show an intention in their favor, as their claim had no other foundation to rest upon.

To the argument which the counsel for the next of kin founded upon the blending of the testator's land and personal estate into one fund, Mr. Scott made the same answer as to the rest of their argument, namely, that the testator intended that the two funds should be blended into one only for the purposes of the gifts which he had made of the blended fund, and, therefore, only so far as those gifts should be effective.

It will be seen, therefore, that Mr. Scott came very near taking what is conceived to be the correct view, namely, that the extent to which the testator had converted his land into money in equity depended upon the extent to which he had made effective gifts of the proceeds of the sale which he had directed, and he never once alluded to the testator's direction to sell his land as measuring the extent of its conversion in equity. Indeed, he fell short of taking the view that the extent of the equitable conversion depended wholly upon the extent of the gifts just referred to, only by making those gifts the sole evidence of the testator's intention to convert, instead of making them the measure of the conversion without regard to the testator's intention to convert.

There was one feature of the case, however, which Mr. Scott's argument thus far failed to meet; for, though the proceeds of the sale of the land had not all been disposed of, a sale of all the land was no less necessary than it would have been if all the proceeds of the sale had been disposed of, there being no other way of ascertaining what amount of money the thirteen surviving legatees were entitled to receive; and, though Mr. Scott had very skilfully diverted the attention of the court from the question whether a sale of all the land was necessary, and had directed it exclusively to the consequences to be deduced from the testator's

failure to make an effective gift of all the proceeds of the sale, yet upon authority it was the intention of the testator to have the land sold, or the existence of a right created by him to have it sold, that caused its conversion in equity, and the testator's failure to dispose of all the proceeds of the sale was material only so far as it showed an absence of such intention, or the non-existence of such a right. What was the testator's intention, then, in the events which had happened, as to the sale of his land? Clearly it was that it should all be sold. To be sure, the evidence of this intention was not as direct as it would have been if the testator had made an effective gift of all the proceeds of the sale which he directed, but it was no less certain. When a testator creates a trust as to land which can be carried into effect only by a sale of the land, the law regards it as certain that a sale of the land was intended. It is equally clear also that there existed a right, created by the testator, to have all the land sold. Indeed, such a right existed in each of the thirteen surviving legatees.

It follows then that, upon authority, there was a complete conversion in equity of all the land into money; and, if so, it also follows, from Mr. Scott's own admission, that the next of kin were entitled to so much of the proceeds of the sale as would have gone to the two deceased legatees if they had survived the testator; for, though in terms he admitted only that a testator "may decide what shall be the nature of his property after his death," yet it is by means of equitable conversion alone that a testator can decide that his land shall, after his death, have the nature of money, or that his money shall have the nature of land. Moreover, if a testator can do this by any equitable conversion which he can make, the testator did it in Ackroyd *v.* Smithson by the equitable conversion which he made.

How, then, did Mr. Scott deal with the admitted fact that a sale of all the land was necessary? The answer is that, in terms, he did not deal with it at all, and his reason seems to have been that he regarded the fact that all the land had been actually sold as having rendered immaterial the fact that a sale of it all was necessary, and accordingly he dealt with the former fact instead of the latter. How did he deal with it? Simply by insisting that so much of the proceeds of the sale as was intended for the two deceased legatees was still land in equity. He said: "Money undisposed of, arising from the sale of lands, in this court is land; and, as such, the heir claims it. Suppose all the fifteen legatees had died in the

lifetime of the testator, would it not have been competent to the heir at law to have insisted, in equity, that no sale should be made of the real estate?[1] . . . If then, in case all the residuary legatees had died, the heir could have prevented a sale, — is it to

[1] 1 Bro. C. C. 507. Lord Eldon also used similar language judicially, more than thirty years later in the case of Hill *v.* Cock, 1 Ves. & B. 173, in which he said: "The only point, calling for decision under this bill, is whether the money arising from the sale of the real estate, which it is not necessary to apply for the only purpose expressed in the will, is to be considered real or personal estate. . . . Where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly or partially, in the former case though the estate has been converted, the whole produce of that conversion will still be real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty. . . . So much of the residue of this money as arose from real estate, must be considered as real and be declared to belong to the heir." Nor was Lord Eldon peculiar in this respect. In Green *v.* Jackson, 5 Russ. 35, 2 R. & M. 238, Sir J. Leach, M. R., said (p. 38): "If a testator directs his real estate to be sold, and the produce to be applied for a particular purpose only, and that purpose fails, the money intended for that purpose retains the quality of real estate, and belongs to the heir." So also as late as 1864 Lord Westbury, when Lord Chancellor, in moving the judgment of the House of Lords in Bective *v.* Hodgson, 10 H. L. Cas. 657, said (p. 666): "The decree [in Hopkins *v.* Hopkins, Cas. *t.* Talb. 44, which had been relied upon by the appellant] was governed by an error which then prevailed, namely, that personal property directed to be converted into realty was converted for all purposes whatsoever, not only the purposes of the will, but the purposes of ownership in every form and by every title. And accordingly it was held that that conversion would operate for the benefit of the heir, although the heir claims in default of disposition in consequence of there being no direction given by the will, and cannot by any possibility be made to claim under the will. That prevalent error was not corrected until the decision of the case of Ackroyd *v.* Smithson, which decided a point that of necessity involved this as its consequence, that conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If therefore the real estate be directed to be sold, with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate, for the purpose of ascertaining the ownership, that is, the title of the heir; although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate. So, in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of lands, retains its pristine and original quality of personal estate, for the purpose of determining the ownership." The instances also are common in which judges speak of money as being land in equity for no other reason than that the heir as such is entitled to have it paid to him. The reason for the prevalence of this language seems to have been that a notion prevailed that an heir as such cannot be entitled to money unless it is land in equity. It is true that money cannot descend to an heir unless it is land in equity; but land which has descended to an heir is, of course, as liable to be converted into money as any other land, and the consequences of its conversion are the same as in other cases.

be said that because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention."[1] To this it may be answered, first, that Mr. Scott's contention that the money in question was land in equity, was not at all necessary for his case, as the heir had the same right to the money after the sale, that he had before the sale to the land which the money represented;[2] secondly, the money in question could not be deemed land in equity for any purpose. The only way in which equity can regard money as land is by converting it directly into land, and, as the land in question had been actually converted into money by the direction of its owner, equity had no right whatever to reconvert it into land.

The real difficulty, however (upon authority, for there is no difficulty upon principle), lies in the fact, not that the land had all been sold, but that its sale had been directed by the testator, and to that fact Mr. Scott gave no answer. While, therefore, the money in controversy clearly belonged to the heir, Mr. Scott did not succeed in proving that it belonged to him; and, indeed, he attempted a feat, the performance of which was impossible, namely, to establish his contention by authority.

What, then, is to be said of Lord Thurlow's decision? From Brown's report of the case, one would infer that the decision was rendered at the conclusion of the argument, but Lord Eldon tells us that "Thurlow took three days to consider"[3] before delivering his judgment. According to the report he disposed of the case in a few informal observations. He said,[4] "he fully approved the determination in Digby *v.* Legard; he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed of money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale; and yet to say that, because a

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[1] Page 508. [2] See 18 HARV. L. REV. 4.

[3] "Well, Thurlow took three days to consider, and then delivered his judgment in accordance with my speech, and that speech is in print, and has decided all similar questions ever since." 1 Twiss, 119.

[4] 1 Bro. C. C. 514.

sale was necessary, the heir should not take the undisposed of part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made in behalf of the heir." It will be seen, therefore, that, if Lord Thurlow is correctly reported, his original opinion in favor of the next of kin was founded on the fact that the purposes of the testator which had taken effect made it necessary that all the land should be sold. Why then had he abandoned that view? One reason was that he regarded Digby *v.* Legard as a direct authority against it; but in that, as we have seen, he was in error. Another reason given by him was that, if all the fifteen legatees had died before the testator, all the land would have gone to the heir, and therefore it followed that, as some, but not all, of the legatees had so died, a proportional part of the land ought to go to the heir, though a sale of all the land would be necessary in the latter case, and none of it in the former. In other words, he had become convinced that the rights of the heir ought not to depend upon the mere question whether the testator's purposes required a sale of the land. It will be seen, therefore, that Lord Thurlow came very near accepting the proposition that a testator causes an equitable conversion of his land into money, not by directing a sale of it, but by making some effective disposition of the proceeds of the sale, and hence that the extent of the conversion, if there be a conversion, is in proportion to the extent of the disposition of the proceeds of the conversion. He did not, however, accept that proposition, but professed to go upon authority, and, upon authority, the difference between the effect produced by the deaths of all the legatees, and the deaths of some of them only, is decisive. Moreover, it is very far from being clear, upon authority, that a sale of all the land would not have been necessary, even though all the legatees had died before the testator.[1] Hence both of Lord Thurlow's reasons for changing his mind seem to fail.

Nor do Lord Thurlow's reasons enable anyone to say upon what legal ground he decided in favor of the heir, and therefore all that he can be regarded as having decided is that the heir was entitled to the money in controversy. Hence it follows that the decision is not properly an authority for any legal proposition, but has the authority of a precedent only. As a precedent, however,

[1] See *infra*, p. 24, proposition 8.

it is an undoubted authority that where a testator directs a sale of his land, but dies intestate as to some portion of the proceeds of the sale, that portion of the proceeds, or so much of the land as it represents, will go to the heir, and not to the next of kin;[1] and accordingly Phillips *v.* Phillips[2] is the only case, since Ackroyd *v.* Smithson, in which, such a question as the foregoing being involved, the decision has been in favor of the next of kin; and the decision in that case, after being universally disapproved of for twenty-one years, was at length formally overruled by Lord Cranworth in Taylor *v.* Taylor.[3]

Indirectly, however, the decision in Ackroyd *v.* Smithson was the means of establishing rules and distinctions theretofore unheard of. For example, after that decision it was no longer true that an unqualified direction in a will to sell land caused an absolute conversion of the land into money, irrespective of the purposes for which the sale was directed, or of the extent to which those purposes took effect; for, as was said by Sir W. Grant, in Williams *v.* Coade,[4] "There could not be a more absolute direction for conversion than that in Ackroyd *v.* Smithson"; and yet it was there held that there was not an absolute conversion of all the land, in the sense in which the term conversion was then understood, and hence there soon came to be a clear distinction between a conversion "out and out" and a conversion for the purposes of the will only. Thus, in 1787, Mr. Cox, in his note to Cruse *v.* Barley, said[5] the several cases on the subject of equitable conversion "seem to depend upon this question, whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the particular purposes of the will." Six years later, he added to the above the following:[6]

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[1] Robinson *v.* Taylor, 2 Bro. C. C. 589; Williams *v.* Coade, 10 Ves. 500; Berry *v.* Usher, 11 Ves. 87; Smith *v.* Claxton, 4 Madd. 484; Hill *v.* Cock, 1 Ves. & B. 173; Maugham *v.* Mason, 1 Ves. & B. 410; Gibbs *v.* Rumsey, 2 Ves. & B. 294; Jessop *v.* Watson, 1 M. & K. 665; Eyre *v.* Marsden, 2 Keen 564; Williams *v.* Williams, 5 L. J. (N. S.) Ch. 84; Fitch *v.* Weber, 6 Hare 145; Johnson *v.* Woods, 2 Beav. 409; Flint *v.* Warren, 16 Sim. 124; Gordon *v.* Atkinson, 1 De G. & Sm. 478; Shallcross *v.* Wright, 12 Beav. 505; Taylor *v.* Taylor, 3 De G. M. & G. 190; Christian *v.* Foster, 7 Beav. 540, 2 Ph. 161; Robinson *v.* London Hospital, 10 Hare 19; Taylor's Settlement, *In re*, 9 Hare 596; Hatfield *v.* Prime, 2 Coll. 204; Wilson *v.* Coles, 28 Beav. 215; Bagster *v.* Fackerell, 26 Beav. 469; Hamilton *v.* Foot, Ir. R. 6 Eq. 572; Richerson, *In re*, [1892] 1 Ch. 379; White *v.* Smith, 15 Jur. 1096; Bedford *v.* Bedford, 35 Beav. 584.

[2] 1 Myl. & K. 649.

[3] 3 De G. M. & G. 190.

[4] 10 Ves. 500, 504.

[5] 3 P. Wms. 4th ed., 22, n. 1.

[6] 3 P. Wms. 5th ed., 22, n. 1.

"For unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty for the purposes of the will, but further that the produce of the real estate shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will, at the time of the testator's death (whether from the silence or the inefficacy of the will itself, or from subsequent lapse) will result to the heir."

On the death of the testator in Ackroyd *v.* Smithson, only three different rights devolved from him relating to his land, namely, first, the legal ownership of the land, which devolved upon the trustees by the devise to them; secondly, the equitable ownership of the land, which descended to the testator's heir; and, thirdly, the right to have the land sold, *i. e.*, exchanged for money, and to receive the money or some portion of it, with the incidental right to receive the rents and profits of the land until the sale was made. This third right did not, indeed, in strictness devolve from the testator, for it was never in him, but was newly created by his will, and not till the moment of his death, and it vested originally in each of his thirteen surviving residuary legatees, and in no one else. It could not possibly vest in the testator's next of kin, as it was not created in their favor. As, therefore, no right was created by the will in favor of anyone to receive that portion of the produce of the land which was intended for the two deceased legatees, it necessarily belonged to the heir, to whom the land which it represented belonged when the sale was made. How, then, could the notion ever be entertained that the next of kin stood in the place of the two deceased legatees? Such a notion, as I have already said,[1] is intelligible only on the assumption that the case was a wholly different one from what it was in fact, namely, that that portion of the land, the produce of which was intended for the two deceased legatees, was, at the moment of the testator's death, converted directly into money by equity itself, and hence, being undisposed of, it belonged to the next of kin. It will be seen, therefore, when the question is considered according to the truth of the case, that the right of the heir did not depend upon whether that portion of the land, the produce of which was intended for the two deceased legatees, had been converted by the will into money in equity. The only difference was that, if it had

[1] See *supra*, p. 3.

not been so converted, it not only devolved in equity upon the heir, but was land in his hands until it was actually sold, while, if it was so converted, though it still devolved upon the heir, yet he took it as money, and hence, if he had died the day after the testator it would have gone to his personal representative.

The courts, however, seem to have thought the question between the heir and the next of kin depended upon whether there had been an equitable conversion or not, and that the latter question was purely a question of the testator's intention; that accordingly, in Ackroyd *v.* Smithson, if the testator intended to convert all his land into money, the next of kin were entitled to stand in the place of the two deceased legatees, but that, if the testator intended a conversion only coextensive with the disposition which he had made of the proceeds of the sale, the heir was entitled to stand in the place of the two deceased legatees. Thus far, therefore, there was no conception of the idea of an heir's taking land by descent, and yet taking it as money, the idea being that the heir took it, if it was land in equity, and the next of kin, if it was money. In Robinson *v.* Taylor,[1] however, decided in 1789 (nine years after Ackroyd *v.* Smithson), Lord Thurlow started the idea[2] that the heir must take unless the testator showed an intention, not merely that the land should be converted, but that its conversion should take effect as from a date prior to the testator's death, it being assumed that the testator's power to make such a conversion was free from doubt. This idea, moreover, has since exerted a great influence, particularly in preventing testators from so converting their land into money as to cause it to devolve upon their next of kin. It soon had the effect, also, of establishing the dis-

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[1] 2 Bro. C. C. 589.

[2] Lord Thurlow said (p. 594): "The difficulty is to find that an unsold residue of real estate can, by any means, go from the heir at law. Inferences have been admitted, where the testator has not expressed himself clearly, to show that he meant to convert the real into personal estate. If it is once deemed sufficient that he meant it to be turned into money, to make it the same as if it had been money before his death, then you will have the testator declaring that he did so. In all the cases, it has been, where he meant it to be converted, out and out, that the testator meant it should become money, but the question is whether he meant it to be the same as if it had been money before his death. It has not been held to be part of the personal estate, but to be disposed of as if it was part of the personal estate. The heir at law is entitled to the residue as a resulting fund. . . . I do not see how the personal representative can ever get at that which was not personal at the death of the testator, but by an express direction — therefore, I think the heir at law, here, is entitled to the residue of the real estate as a resulting fund."

tinction between an heir's taking land as land and taking it as money; for, if a testator showed an intention to convert his land into money, but not so to convert it as to carry it to the next of kin, it followed that it must go to the heir, and yet he could take it only as money, as it would be converted into money in equity immediately on the testator's death. Suppose, however, it should turn out that, while Lord Thurlow's idea was adhered to in other respects, a testator had no power so to convert his land into money by will that the conversion would take effect before his death. Of course the consequence would be that the heir would take, whether there was an equitable conversion or not, taking the land as land if there was not an equitable conversion, and taking it as money if there was. Moreover, that was virtually what happened. Thus, in Sheddon *v.* Goodrich,[1] where a testator, by a will attested by three witnesses, had directed his land to be sold, and had made a disposition of the proceeds of the sale, it was held by Lord Eldon that he could not by a subsequent will, attested by two witnesses only, change such disposition; and in Hooper *v.* Goodwin,[2] where land was directed by will to be sold, it was held by Sir W. Grant, M. R., that the produce of the sale could not be disposed of by an unattested codicil; and, in neither of these cases was any inquiry made as to the time when the testator intended the equitable conversion of his land should take effect. After these decisions, therefore, it seems to have been impossible to contend that any equitable conversion by will could take effect before the testator's death. Accordingly, in the well-considered case of Smith *v.* Claxton,[3] where a testator made two separate devises of two parcels of land in trust to be sold for purposes which totally failed, as to the land first devised, and which partially failed, as to the land secondly devised, and the testator's heir died soon after the testator and before either parcel of land was sold, Sir J. Leach, V. C., held that, in the events which had happened, the testator did not intend to convert the parcel of land first devised, and hence it descended in equity to the heir, and he took it as land; but that he did intend to convert the entire interest in the land secondly devised, a sale of the entire interest being necessary for the purpose which had taken effect, and, therefore, though the undivided half of the land, as to which the purpose of the sale had failed, had descended to the heir in equity, the

[1] 8 Ves. 481. [2] 18 Ves. 156. [3] 4 Madd. 484.

equitable conversion of it not coming in time to intercept its descent to him, yet the heir took it, not as land, but as money. So also, fourteen years later, in the case of Jessopp *v.* Watson,[1] where the testator devised his land in trust to be sold for the payment of his debts, legacies, and annuities, and also for other purposes which totally failed, the same learned judge, then Master of the Rolls, held that, in the events which had happened, the testator intended that the land should be sold, namely, for the purposes which had taken effect, and, therefore, though the land had descended to the heir, subject to debts, legacies, and annuities, yet he took it as money.[2]

The fact that land directed by a will to be sold, will descend to the testator's heir, so far as the proceeds of its sale are not otherwise disposed of, notwithstanding that the land has been entirely converted in equity by the will, proves also that the testator's next of kin can never derive any benefit from land so directed to be sold, unless the will contain a direct gift to them. This latter proposition is, moreover, also directly established by authority. Thus, in Jarman on Wills,[3] the learned author, after quoting that portion of Mr. Cox's note to Cruse *v.* Barley which was published in 1787,[4] says: "There seems to be no ground to except to this statement of the doctrine, provided that, by an intention to give to real estate the quality of personalty 'to all intents' we are allowed to understand something very special and unequivocal, amounting in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition, 'But that every conversion, however absolute in its terms, will be

[1] 1 Myl. & K. 665.

[2] I shall endeavor to show hereafter that there was, in truth, no equitable conversion in Jessopp *v.* Watson, whatever the testator's intention may be supposed to have been in regard to a sale of the land, as the debts, legacies, and annuities, for the payment of which alone a sale was to be made, constituted only a charge on the land. See also 18 HARV. L. REV. 83–93.

[3] Vol. I., 1st ed., p. 558, published in 1843.

[4] See *supra*, p. 13.

deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.'" So also, in the very carefully considered case of Fitch *v.* Weber,[1] Wigram, V. C., said: "The next of kin are claiming property of the testator, which at his death was real estate, and, in order to substantiate that claim they must make out from the will that they are devisees of the property; not being mentioned in the will, they must make out a devise by implication, — which might be sufficient, although Lord Thurlow, in Robinson *v.* Taylor, has said he 'did not see how the personal representatives could get at that which was not personal estate at the death of the testator but by express words.' The law is to some extent clear upon authority; a devise upon trust to sell and convert real estate into money is, in some sense, a direction to turn real into personal estate, but it is clear that such a devise will not necessarily entitle the next of kin to claim any portion of the proceeds of the sale of real estate which, by the terms of the will or in event, is or becomes undisposed of. The will in that case may determine the quality in which the property will devolve upon those who take it, but is silent as to the persons upon whom it shall devolve. The testator clearly means the real estate to become money after his death, but (as Lord Thurlow said in the case referred to) the question is, whether he means it to be the same as if it had been money before his death. . . . In the simple case of a devise upon trust to sell, and no trust of the surplus declared, it has apparently been thought by some text-writers that the court would be driven to imply a trust for the next of kin; but that has never been so decided, and if ever such a case should call for decision, it may deserve much consideration. However clear, in such a case, it may be that the testator means his real to be treated as personal estate after his death, the question remains, does he mean it to be treated also as if it had been personal estate before his death? — that (as Lord Thurlow observed) is the question." In Johnson *v.* Woods,[2] also, Lord Langdale, M. R., said: "It is undoubtedly practicable for a testator to say that his real estate shall be sold, and that the produce shall go to such persons as are by law entitled to his personal estate. When, therefore, it can be

[1] 6 Hare 145, 147.

[2] 2 Beav. 409, 413.

ascertained that a testator intended that the produce of real estate should, to all intents and purposes, be treated as personal estate possessed by him at his death, so as to devolve upon the person entitled to his personal estate, the court will give effect to that intention." In Flint *v.* Warren,[1] Shadwell, V. C., said: "The testatrix has directed her real estates to be sold, and the net proceeds to form part of her personal estate; but she has not made any gift of that part. As then it is not given away, there is nothing to take it from the heir." In Taylor *v.* Taylor,[2] Lord Chancellor Cranworth said: "The law gives the estate to the heir notwithstanding the direction of the testator, unless the testator makes a valid devise of it otherwise. Of course I do not mean to say that a testator might not so dispose of the proceeds of real estate as to make it go to the next of kin. . . . In that case the next of kin would take, because there would be an express gift to them by the testator, but not as an interpretation of words of direction, such as we have here." In the cases cited in the note,[3] in which it was also held that the testator's land was converted in equity into money by the will, and, therefore, that the heir took as money that portion of the land the produce of which was not disposed of, if the first proposition is correct, the second necessarily follows.

Upon the whole, therefore, it may now be considered as clear, upon authority as well as upon principle, that it is not possible for a testator so to convert his land into money by will, that upon his death it will devolve, by operation of law, upon his personal representative or next of kin, and, therefore, Mr. Scott's admission, in Ackroyd *v.* Smithson, "that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives,"[4] is no longer true in its full extent.[5] It is still true, however, upon authority,

[1] 16 Sim. 124, 129.

[2] 3 De G. M. & G. 190, 197.

[3] Hatfield *v.* Prime, 2 Coll. 204; White *v.* Smith, 15 Jur. 1096; Taylor's Settlement, *In re*, 9 Hare 596; Bagster *v.* Fackerell, 26 Beav. 469; Wilson *v.* Coles, 28 Beav. 215; Attorney General *v.* Lomas, L. R. 9 Exch. 29; Hamilton *v.* Foot, Ir. R. 6 Eq. 572; Richerson, *In re*, [1892] 1 Ch. 379. For comments on the foregoing cases, see *infra*, p. 26.

[4] See *supra*, p. 7.

[5] And yet, as late as 1833, Sir John Leach, M. R., in Jessopp *v.* Watson, 1 Myl. & K. 665, says (674): "A testator may, if he pleases, direct that the produce of his real estate which he orders to be sold, shall, in all events and for all purposes, be considered as if it had been personal estate at his death."

that a testator may by his will convert his land into money, not merely for the purposes of his will, but "out and out," though the consequence of his so doing will not be the same as formerly, *i. e.*, instead of causing the land to devolve upon the personal representative, its only effect will be to cause the heir to take as money so much of the land as descends to him. It may be added that, as it is no longer true, even upon authority, that a testator can so convert his land by will as to cause it to devolve, by operation of law, upon his personal representative, so it ought to be no longer true, upon authority, that a testator can so convert his land into money by will as to cause it to devolve, by the same will, as personal estate, unless it appears on the face of the will that the testator intended "personal estate" to include the produce of land directed by the will to be sold.[1]

That it is still true, upon authority, though not upon principle, that a testator may by his will convert his land into money "out and out," — a slight glance at the authorities will sufficiently prove. Thus in Berry *v.* Usher,[2] decided twenty-five years after Ackroyd *v.* Smithson, Sir W. Grant, M. R., said: "If the character of personal estate was imposed upon the real estate to all intents and purposes, the mere appointment of an executor would be sufficient to carry that property to him, either for his own benefit, or as trustee for the next of kin." This shows that that learned judge then held the law to be as it was admitted to be by Mr. Scott in Ackroyd *v.* Smithson; and Wright *v.* Wright[3] shows that he still held the same opinion four years later. And yet the opinion thus expressed seems to be inconsistent with the decision of Lord Eldon, in Sheddon *v.* Goodrich,[4] made more than two years before Berry *v.* Usher was decided. So also in Hill *v.* Cock,[5] decided in 1813, Lord Eldon, in holding that the heir, and not the next of kin, was entitled to the undisposed of produce of land directed by the testator to be sold, treated the question as being purely one of intention, notwithstanding his own decision in Sheddon *v.* Goodrich, and Sir W. Grant's decision in Hooper *v.* Goodwin.[6] In Attorney General

[1] See 18 HARV. L. REV. 97–101.

[2] 11 Ves. 87, 91.

[3] 16 Ves. 188.

[4] 8 Ves. 481.

[5] 1 Ves. & B. 173.

[6] For some reason which I have been unable to discover, Sheddon *v.* Goodrich and Hooper *v.* Goodwin have exerted much less influence over subsequent decisions upon equitable conversion than, as it seems to me, they ought to have exerted. They have seldom been cited to prove that a testator cannot by his will so convert his land

v. Holford,[1] decided in 1815, where a testator devised an interest in land in trust to be sold for purposes which wholly failed, the court held that there was a conversion of the land "out and out," and yet that it did not devolve in equity upon the personal representative, but upon a residuary devisee, who, however, took it as personal estate, Thomson, C. B., saying, if such devisee had died immediately after the testator, the land would have gone to his personal representative. In Bunnett *v.* Foster[2] Lord Langdale, M. R., said: "There is no sufficient reason for holding that a conversion out and out was intended. Unfortunately this is a very vague expression. But the case of the heir does not require it to be laid down that there can in no case be a conversion, except for the purposes of an express trust. It is sufficient to say no intention is shown to convert for any other purposes than those specifically pointed out, and

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into money as to cause it to devolve by operation of law upon his personal representative; and yet they seem to me to constitute the only proof of that proposition of which the courts could avail themselves consistently with the views upon equitable conversion to which they have constantly adhered. Nor is either of these cases cited once by Jarman in his chapter on equitable conversion. 1 Jarman, 1st ed., c. xix.

While reading the proof of this article, a reason has occurred to me why Sheddon *v.* Goodrich and Hooper *v.* Goodwin have been so little cited in connection with equitable conversion, namely, that the courts never held that equitable conversion created by will took effect prior to the testator's death (see Beauclerk *v.* Mead, *supra*, p. 1, n. 3), and, therefore, the decisions in Sheddon *v.* Goodrich and Hooper *v.* Goodwin respectively threw no new light upon the question when such conversions take effect. In fact, my difficulty arose from my not applying here what I said at the beginning of this article, when attempting to explain the theory upon which the courts held, prior to Ackroyd *v.* Smithson, that land converted in equity into money by will, devolved, at the testator's death, upon his executor, if not otherwise disposed of, namely, not because they supposed the conversion took effect prior to the testator's death, but because they erroneously assumed that the conversion consisted in a fictitious transmutation of the land into money by equity itself, and hence they concluded that the testator's heir or devisee, on whom the land devolved at the moment of the testator's death, became, at the same moment, a trustee for his executor. See *supra*, p. 3.

If the courts had borne in mind from the beginning that what a testator does, when he is said to convert his land into money by will, is to direct the land to be exchanged for money, at the same time creating in some person a right to have the exchange made by giving him some of the money to be received in exchange, or some interest in such money, and that the equitable conversion is coextensive only with the right or rights so created, the view which prevailed prior to Ackroyd *v.* Smithson could never have come into existence, and if Lord Thurlow, when he decided Ackroyd *v.* Smithson, instead of temporizing as he did, had exposed and rooted out the misconception and error upon which the then existing view was founded, he would have rendered an incalculable service to the English-speaking world.

[1] 1 Price 426.

[2] 7 Beav. 540, 543.

which have failed." In White *v.* Smith[1] a testator devised land in trust for his son for life, and then in trust for sale, the proceeds, after payment of legacies, to be invested, and the income to be applied to the maintenance of the children of said son, each child to receive his share at twenty-one; and the son having died unmarried, and the land not having been sold, Knight-Bruce, V. C., declared the trust for sale to be absolute and unconditional, and hence the land to be converted into money in equity, without reference to the disposition of the proceeds of the sale, and, therefore, the heir took the same as money. In Wall *v.* Colshead,[2] a testator devised life estates in certain lands, at the termination of which he devised the same to his executors to be sold, and the proceeds, divided among the children of the tenants for life, — who, however, died without issue, and the court held that the land was converted into money "out and out," and, therefore, though it went to the testator's residuary devisees,[3] yet they took it as money. Knight-Bruce, L. J., said: "I think the trust for sale was not conditional but absolute." Turner, L. J., said: "The question is whether the testator intended a conversion out and out, or only for the purpose of division between the children of the tenants for life. On the death of a tenant for life, leaving children, all of whom were under twenty-one, the trust for sale would arise, though the shares of the children would not be indefeasibly vested. By the clause immediately following the residuary gift in the will, if a tenant for life died under twenty-one, there was to be a sale for the benefit of other persons than the children of the tenant for life so dying. Therefore the testator has shown that he did not intend to limit the conversion to the case of there being children of the tenant for life of each property, and the trust for conversion not being limited to that event, I do not see how to limit it." It will be seen, therefore, that the court treated the question whether the conversion was "out and out" or only for the purposes of the will, as depending entirely upon the testator's intention as to the circumstances under which the property should be sold. Lastly, in Attorney General *v.* Lomas,[4] where a testator devised his lands to trustees in trust to be sold, but the purposes of the sale failed, the court held that the trust for sale was absolute, whether any effective disposition was made of the proceeds of the

[1] 15 Jur. 1096.
[2] 2 De G. & J. 683, 688, 689.
[3] See comments on Attorney General *v.* Holford, *infra*, p. 27.
[4] L. R. 9 Exch. 29.

sale or not, *i. e.*, that the land was converted into money "out and out," and, therefore, though it went to the heir, she took it as money.

What, then, are the changes which the authorities show to have taken place, in respect to the equitable conversion of land into money by will, since Ackroyd *v.* Smithson was decided?

1. As to what constitutes such equitable conversion there has been no change. It is, and always was held that the equitable conversion of land into money by will is caused by the declared intention of the testator to have his land sold after his death; and this intention may be declared by directing something to be done with the land which will render a sale of it necessary.

2. Prior to Ackroyd *v.* Smithson evidence of such intention seems to have been looked for only in such directions as the will contained respecting a sale of the land, and the mode of dealing with and managing the proceeds of the sale prior to, or independent of, any gift of the latter, while, since Ackroyd *v.* Smithson was decided, such evidence has been primarily looked for in the gift or gifts which the testator makes of the proceeds of the sale; and, as evidence of an intention to have the land sold, a gift which does not take effect is regarded as no gift.

3. In the absence of evidence to the contrary it will be presumed that the testator intended to have so much only of the land sold as his effective gifts of the proceeds of the sale shall render necessary, and hence so much of the land only will be converted in equity, — a rule, however, which had no existence prior to Ackroyd *v.* Smithson.

4. Prior to Ackroyd *v.* Smithson, as no attention was paid to a testator's purpose or object in directing a sale of his land, and hence a direction to sell for one purpose was treated as a direction to sell for all purposes, so a direction to sell for any purpose was regarded as causing an equitable conversion for all purposes. Since Ackroyd *v.* Smithson, however, the doctrine has become established that an equitable conversion by will is presumptively coextensive only with the purposes for which the sale is directed, and hence the distinction has become established between an equitable conversion for the purposes of the will only, and an equitable conversion "out and out"; and as the presumption is that a testator intends the land to be sold only for the purposes which he expresses in his will, so the presumption is that he intends to create an equitable conversion for the purposes of his will only.

5. It has always been held that a direction by a testator in his will to sell his land at all events will be valid and binding, whether he make a gift of the proceeds of the sale, or of any part thereof, or any interest therein, or not. While, however, prior to Ackroyd *v.* Smithson any unqualified direction to sell was presumed to be a direction to sell at all events, since that case such a direction is presumed to be a direction to sell only for the purposes expressed in the will, *i. e.*, only to such extent as the gifts which are made of the proceeds of the sale shall render necessary, and hence to cause an equitable conversion only to the same extent.

6. While it has always been held that a testator could by his will require his land to be sold at all events, and could thus convert it into money in equity "out and out," yet a conversion "out and out" has meant less since Ackroyd *v.* Smithson than it did before; for, while such a conversion before Ackroyd *v.* Smithson caused any portion of the land the produce of which was not disposed of, to go to the testator's personal representative, it now has merely the effect of causing the heir to take the same as money.

7. But, while the authorities clearly show that the effect produced by a conversion of land into money in equity has undergone the change indicated in paragraph 6, they give no satisfactory reason for such change, though the true reason seems to be that the courts now recognize the fact, as they did not prior to Ackroyd *v.* Smithson, nor till long afterwards, that an equitable conversion of land by will can never come in time to intercept the descent of the land to the testator's heir.

8. The authorities show that, except so far as the contrary is indicated in paragraph 7, the intention of the testator is still as supreme in respect to equitable conversions by will as it ever was, and I am, therefore, now prepared to give an answer to the question with which my last article concluded,[1] namely, what is, upon authority, the measure of the extent of the equitable conversion of land into money caused by a will? And the answer is that the only measure of such a conversion is the intention of the testator as to the sale of the land; for it is held that a testator can by his will convert his land into money without making any gift of the proceeds of the sale of such land, and consequently without creating any right in anyone to have the land sold, and though a sale of the land will leave the ownership of the proceeds of the sale where the ownership of the land was when the sale was made.

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[1] See 18 HARV. L. REV. 270.

9. In spite of what is said in paragraph 8, it has always been assumed, and within a recent period has been held,[1] that a direction to sell is a *sine qua non* of every equitable conversion of land by will. Moreover, it has always been held that a conditional direction to sell land can cause no equitable conversion until the condition is satisfied;[2] and the same is true of a direction to sell which is not intended to be imperative,[3] *i. e.*, that it can cause no equitable conversion. A testator may, however, make his direction to sell his land as absolute and as imperative as he pleases, and yet, if he makes no gift of the proceeds of the sale, his direction to sell cannot be enforced; still less can it be specifically enforced. In short, we are told that a trust for sale is a *sine qua non* of every equitable conversion by will, and yet that there need be no *cestui que trust*, nor any power of enforcing the trust. It would seem, therefore, that the courts would have been more consistent if they had held intention alone to be sufficient to create an equitable conversion by will, though, in that case, consistency would be the only virtue that could be attributed to them.

10. On the whole, if regard be had to authority alone, the differences between the law as it stands to-day and as it stood prior to Ackroyd *v.* Smithson in respect to equitable conversion by will, are much less than they have generally been supposed to be; nor ought this to be a matter of surprise to anyone who reflects that neither the counsel for the successful party in Ackroyd *v.* Smithson, nor the judge who decided that case, founded their argument upon anything else than the intention of the testator and the existing authorities.

Nothing has hitherto been said as to the influence exerted by Ackroyd *v.* Smithson upon the equitable conversion of money into land by will, and not much need be said. The question whether the change effected by Ackroyd *v.* Smithson, as to the conversion by will of land into money, should be extended by analogy to the equitable conversion by will of money into land, arose, for the first

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[1] Hyett *v.* Mekin, L. R. 25 Ch. D. 735.

[2] Taylor's Settlement, *In re*, 9 Hare 596; Hardy, *Ex parte*, 30 Beav. 206; Raw, *In re*, L. R. 26 Ch. D. 601.

[3] Stamper *v.* Millar, 3 Atk. 212; Doughty *v.* Bull, 2 P. Wms. 320. It seems to have been generally supposed that a conditional direction to sell land, or a direction which is not intended to be imperative, does not cause an equitable conversion because it does not show an intention to have a sale made at all events; but the true reason seems to be that such a direction creates no right to have a sale made, and imposes no obligation to make a sale.

time, fifty-six years after Ackroyd *v.* Smithson was decided,[1] in the case of Cogan *v.* Stevens,[2] and was decided in the affirmative by Sir C. C. Pepys, M. R. (afterwards Lord Cottenham), notwithstanding an apparent decision to the contrary[3] by Lord Somers and the House of Lords; and his decision has since been followed.[4]

As the cases cited in this article have been considered almost wholly from the point of view of authority, it may not be out of place to make a few remarks upon some of them from the point of view of what is conceived to be principle. Thus, in Ackroyd *v.* Smithson, there was, upon principle, no equitable conversion of that portion of the land the produce of which was intended for the two deceased legatees, as there was no one who had a "right" to have that portion of the land sold, and to receive the proceeds of its sale; nor can there ever be an equitable conversion in favor of the person who makes such conversion, or in favor of his heir as such. Therefore, that portion of the land descended in equity, at the testator's death, to his heir, in whose hands it was land until its actual sale, when it became money for all purposes.[5] The same is also true in Robinson *v.* Taylor,[6] and Williams *v.* Coade.[7] In Wright *v.* Wright,[8] also, there seems to have been no equitable conversion, except, possibly, in favor of the testator's wife for her life, and, therefore, the land ought to have been held to have descended in equity, at the testator's death, to his heir, subject to the testator's debts and to the life interest of his wife. In Smith *v.* Claxton,[9] there was, for the reason already stated, no equitable conversion as to the testator's heir as such, and, therefore, it was erroneously held that he took as money the one-half of the land secondly devised as to which the purpose of the devise had failed. In Hill *v.* Cock[10] it seems there was no equitable conversion, the land having merely been charged with debts and legacies.[11] The

[1] This may serve to remind the reader that, since Ackroyd *v.* Smithson, equitable conversions by will of money into land have been infrequent, as compared with equitable conversions of land into money.

[2] 1 Beav. 482, n. See also *supra*, p. 5, n. 1.

[3] Fletcher *v.* Chapman, 3 Bro. P. C., Tomlin's ed., 1.

[4] Reynolds *v.* Goodlee, John. 536, 582; Curteis *v.* Wormald, 10 Ch. D. 172. See also, 18 HARV. L. REV. 14–19.

[5] See 18 HARV. L. REV. 5, 6.

[6] 2 Bro. C. C. 589; and see 18 HARV. L. REV. 6.

[7] 10 Ves. 500.

[8] 16 Ves. 188.

[9] 4 Madd. 484.

[10] 1 Ves. & B. 173.

[11] I shall hereafter endeavor to show that a direction to sell land, whether by will or

same is also true of Maugham *v.* Mason,[1] except that the land was there charged with legacies only. In Attorney General *v.* Holford,[2] the correct view would seem to have been that as all the purposes of the sale failed, the trust for conversion also failed, and, as there was no equitable conversion of the land, that consequently the equitable ownership of the land, the legal ownership of which vested in the trustees, either descended to the heir, or passed to the residuary devisee. Under no circumstances can a residuary devisee, as such, acquire a right to have land sold, and to receive the proceeds of the sale, or any part of such proceeds.[3] In Jessopp *v.* Watson[4] there was no equitable conversion, as the purposes of the sale all failed, except the payment of debts, legacies, and annuities, and the latter constituted a mere charge.[5] For the other reasons already given also, there was no equitable conversion as to the testator's heir, and, therefore, the latter took the land as land. In Phillips *v.* Phillips[6] it was erroneous to hold that the one-fifth of the land the produce of which was intended for the deceased brother, went to the testator's next of kin; if for no other reason, because there was no equitable conversion of that portion of the land. The same is also true, *mutatis mutandis*, of Fletcher *v.* Chapman.[7] In Flint *v.* Warren[8] it seems clear that there was no equitable conversion of the land into money, as the will merely charged the land with the payment of the testator's debts and legacies in aid of the personal estate, and it appeared that the latter was abundantly sufficient to pay them all.[9] In Shallcross *v.* Wright,[10] also, the land was merely charged with debts and legacies, and, therefore, there was no equitable conversion of it into money. In Hatfield *v.* Prime[11] the testator's heir took as land that portion of the land the produce of which had not been effectively disposed of, there having been no equitable conversion of it into money, nor, indeed, any equitable conversion of any of the land as to the testator's heir. In Wilson *v.* Coles[12]

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by deed, for the mere purpose of satisfying a charge or charges thereon, never causes an equitable conversion. And see 18 HARV. L. REV. 83–93.

[1] 1 Ves. & B. 410. See also 18 HARV. L. REV. 20, n. 3.

[2] 1 Price 426.

[3] See 18 HARV. L. REV. 94, 95.

[4] 1 Myl. & K. 665.

[5] See *supra*, p. 26, n. 11.

[6] 1 Myl. & K. 649.

[7] 3 Bro. P. C., Tomlin's ed., 1.

[8] 14 Sim. 554; 16 Sim. 124.

[9] See *supra*, p. 26, n. 11.

[10] 12 Beav. 505. See also *supra*, p. 26, n. 11.

[11] 2 Coll. 204.

[12] 28 Beav. 215.

there was no equitable conversion of the land, except as to the wife, and even, as to her, there was an equitable conversion for her life only. On the testator's death, therefore, the land immediately descended to his two co-heirs, subject to the wife's life estate, and when one of the co-heirs died, her share went to her heir, and was land in the hands of the latter until its actual sale, when it became money for all purposes.[1] In Attorney General *v.* Lomas,[2] no right was created in any one to have the land sold, and, therefore, there could be no equitable conversion. Nor could there be any equitable conversion in favor of the testator's heir, even if there were one in favor of others. In Hamilton *v.* Foote [3] the testator's land descended at her death to her heir, subject only to the life estate devised to the testator's sister, and to the two legacies of £500 each. There was no equitable conversion of any of the land as to any person, nor could any of the land be sold, if the heir chose to pay the two legacies, nor could any more be sold, under any circumstances, than enough to pay those legacies. In *In re* Richerson [4] there was no equitable conversion of the testator's land, except as to the tenants for life respectively, and, even as to them, only to the extent of their respective life interests. At the testator's death, therefore, the land descended to his sister and heir, subject, however, to the life interests and to the right of the respective tenants for life to have the land sold. As to so much of the land as was actually sold between the testator's death and the death of the sister, the latter's title to the land was devested by the sale, she acquiring a title to the purchase-money instead, and, on the death of the sister, so much of the land as remained unsold descended to her heir, and the produce of what had been sold devolved upon her personal representative, and, as to so much of the land as was sold between the sister's death and the death of the surviving tenant for life, the title of the sister's heir to the land was devested, and he acquired a title to the purchase-money instead. In Wall *v.* Colshead,[5] the purposes of the sale having all failed, there was no equitable conversion of the land, and the latter passed, at the testator's death, to his residuary devisees, who took it as land, though subject to the life interests of the tenants for life. So also, in White *v.* Smith,[6] the purposes of the sale all failed, and

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[1] See 18 HARV. L. REV. 6.
[2] L. R. 9 Exch. 29.
[3] Ir. R. 6 Eq. 572.
[4] [1892] 1 Ch. 379.
[5] 2 De G. &. J. 683. See also *supra*, p. 22.
[6] 15 Jur. 1096. See *supra*, p. 22.

hence the land descended to the testator's heir, who took it as land, though subject to legacies. In *In re* Taylor's Settlement,[1] a testator devised his land in trust to be sold, and its produce divided among his seven children, and one of the children having died before the testator, it was properly held that the one-seventh of the land, the produce of which was intended for the deceased child, went to the testator's heir, but improperly held that the latter took it as money.[2]

C. C. Langdell.

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[1] 9 Hare 596. Bagster *v.* Fackerell, 26 Beav. 469, is subject to the same observations as Taylor's Settlement, *In re*. In that case, however, it would seem, from the length of time that had elapsed since the testator's death, that the land must have been actually sold, — in which case, of course, the heir would take the money as money. Compare also Ackroyd *v.* Smithson, *supra*, p. 26, and Smith *v.* Claxton, p. 26.

[2] In Clarke *v.* Franklin, 4 Kay & J. 257, where a trust for converting land into money was created by deed, but all the purposes of the trust failed *ab initio*, except the payment of six sums of 50 *l.* each, and one sum of 20 *l.*, to persons named, it was held that the equitable interest in the land resulted immediately to the grantor, subject only to the payment of those seven sums, but that the same was money in his hands, the land being converted into money in equity the moment that the deed was delivered. It was, therefore, held that the grantor, by directing the land to be sold, *i. e.*, exchanged for money, had immediately converted it into money, so that it became money in his own hands. This, however, was not merely a complete non-sequitur, *i. e.*, a thing which did not in the least follow from the direction to sell the land, but it was a legal impossibility. On the delivery of the deed the legal title to the land passed to the trustee, the equitable interest remaining in the grantor; and at the same moment, according to the decision, there was a transmutation of this equitable interest from land into money. Such a transmutation could be made, however, only by equity itself, and equity could make it only for an adequate cause, and it was not pretended that any cause existed. Moreover, such a transmutation would be entirely independent of the direction to sell the land, and inconsistent with it. It may be added that the seven persons, each of whom was to receive a small sum out of the proceeds of the sale, had nothing to do with the equitable conversion, having merely a charge on the land, for the amounts coming to them respectively.